(3)

No. 01-619

In The
Supreme Court of the United States

PATRICIA BRAGG, *et al.*,

Petitioners,

v.

WEST VIRGINIA COAL ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of the Secretary of the West Virginia Department of Environmental Protection In Opposition to the Petition for a Writ of Certiorari

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QUESTION PRESENTED

The Question Presented by the Petitioners is misleading and attempts to reinvent this case.

This case asks whether a federal district court ordered a state official, administering state surface mining laws and regulations, to conform his conduct to state law or federal law. On a straight statutory interpretation of SMCRA, the Court of Appeals found that the district court ordered conformity to state law and that, under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), it plainly lacked jurisdiction to do so.

Specifically, the Court of Appeals "return[ed] to the statutory structure of SMCRA" and held that the federal Surface Mining Control and Reclamation Act ("the Act" or "SMCRA") "does not provide for shared regulation of coal mining." SMCRA, the Court of Appeals held, provides "for enforcement of either a federal program or a state program, but not both." Given this statutory structure, the Court of Appeals found that "the district court's injunction created

two layers of indignity, as it not only directed the Director[1] to make findings required by the West Virginia Act, see W.Va. Code § 22-3-18, but in so doing, also ordered the Director to make findings required by the state-law buffer zone regulation..."

So this case does not present the broad, vague question posed by the Petitioners. The precise question raised by the Court of Appeals decision is simply whether the district court, on the facts of this case, was enforcing state law or federal law.

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[1] This refers to the Director of the West Virginia Division of Environmental Protection. Today, as a result of an intervening state reorganization, the successor official and respondent here is Michael Callaghan, Secretary, West Virginia Department of Environment Protection (WVDEP). "Director" will be used in this brief in opposition.

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Brief of the Secretary of the West Virginia Department of Environmental Protection in Opposition to a Writ of Certiorari

Respondent Michael C. Callaghan, Secretary, West Virginia Department of Environmental Protection (WVDEP) respectfully opposes issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Nothing about this case is worthy of certiorari.

First, the decision below rests on a simple statutory construction of SMCRA. The construction is not in conflict with any prior opinion of this Court. Second, there is no compelling need for this Court to review the work of the Court of Appeals because it does not conflict with decisions of important federal questions by another federal Court of Appeals or highest state court.

Thus, denying certiorari will leave a sensible construction of SMCRA in place, and will give the other federal Courts of Appeal a chance to comment on, accept, or reject the interpretation of SMCRA set forth by the Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

Congress enacted the Surface Mining Control and Reclamation Act ("SMCRA") in 1977 to establish minimum nationwide environmental standards to govern coal mining operations. 30 U.S.C. § 1202. SMCRA is administered through the United States Department of the Interior by the Office of Surface Mining Reclamation and Enforcement (OSM). 30 U.S.C. § 1211. Congress, however, recognized that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations

for surface mining and reclamation operations ... should rest with the states." 30 U.S.C. § 1201(f).

To achieve that end, Congress instructed any state wishing "to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" on non-federal lands within its borders to submit a proposed State program to OSM for approval. 30 U.S.C. § 1253(a). Once a state program is approved, state, not federal, law governs surface mining operations within the state's borders. Compare 30 U.S.C. § 1253(a) ("State programs") with 30 U.S.C. § 1254(a) ("Federal programs").

On January 21, 1981, OSM approved the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), 30 C.F.R. § 948.10, giving West Virginia exclusive jurisdiction to regulate surface coal mining within its borders. The Question Presented, as framed by the Petitioners, incorrectly asserts that the state regulation at issue "is codified in the Code of Federal Regulations." Opening the Code of Federal Regulations, one searches in vain for such "codification." The Code of Federal Regulations merely lists the West Virginia statutes and regulations approved by the federal Office of Surface Mining as consistent with the minimum federal standards required by SMCRA. 30 C.F.R. §§ 948.1 - 948.30. The Code of Federal Regulations nowhere provides the complete text of these West Virginia statutes and regulations. Rather, it advises readers that copies of West Virginia's program may be obtained at the West Virginia Division of Environmental Protection (WVDEP) office in Nitro, West Virginia, or the OSM Field Office in Charleston, West Virginia. 30 C.F.R. § 948.10. By comparison, the federal Surface Mining regulations are "codified" in their full text at 30 C.F.R. pt. 772-85.

The State program is administered by WVDEP. OSM only retains a role of limited oversight of the state program. See 30 U.S.C. §§ 1267, 1271. Thus, since 1981, persons wishing to mine coal in West Virginia have been

required to obtain a WVSCMRA permit from the WVDEP. WVSCMRA is found at W.Va. Code § 22-3-1, et. seq.; the State regulations are codified at 38 W.Va. Code St. R. § 2.1, et seq.

Surface mining requires removal of massive amounts of rock and dirt - overburden or "spoil" - to expose the coal. So does the initial site preparation or face-up of surface mines. The overburden, once removed, "swells" and displaces a greater volume than it occupied prior to mining." WVSCMRA requires this overburden to be used to restore the approximate original contour of the mountains. See W.Va. Code § 22-3-3(e). Because of the increase in volume, the amount of spoil is greater than needed to restore approximate original contour and the excess spoil is placed in a nearby valley - a "valley fill." In the rugged, hilly terrain of West Virginia, valleys generally contain streams. Valley fills themselves are regulated, engineered structures. They are designed to be safer and more stable than their pre-SMCRA predecessors. See, e.g., 38 W.Va. Code St. R. § 2-14.14.e. These engineering requirements account for the "massive, artificially landscaped stair steps" which the district court and Petitioners so dramatically recount. (Petition at 8.)

Valley fills and the portions of the streams that they cover are the physical focus of the Petitioners' underlying case. Specifically, in Counts II and III of their Second Amended Complaint[2], Joint Appendix ("JA") 1794-1797, Petitioners challenged the application of a single West Virginia regulation, the "buffer zone" rule. 38 W.Va. Code St. R. § 2-5.2. Standing alone, the buffer zone rule prohibits disturbances within 100 feet of intermittent or perennial streams, but permits variances in some circumstances. Id. Historically, WVDEP has not applied the buffer zone rule to the portion of a stream beneath a valley fill because the

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2 Counts II and III are the only Counts still in dispute. All other Counts in the Complaint have been settled.

preceding, related section of the state regulations permits fills - overburden - to be placed in streams:

> Natural drainways in the permit area shall be kept free of overburden *except where overburden placement has been approved.* Overburden placement and haulageways constructed across natural drainways shall not materially increase the sediment load, or materially affect stream quality.

38 W.Va. Code St. R. § 2-5.1 (emphasis added). This regulation is unique to West Virginia. The Petition fails to mention or cite this critical regulation.

Under the West Virginia surface mining regulations, "intermittent stream" is defined as "[a] stream or reach of a stream that drains a watershed of at least one square mile, or [a] stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge." 38 W.Va. Code St. R. § 2-2.69. "Perennial stream" means "a stream or portion of a stream that flows continuously." 38 W.Va. Code St. R. § 2-2.86. None of these definitions turn on volume or size. A perennial stream can be a seep the width of a pencil.

Petitioners sued the Director of WVDEP, claiming that WVDEP was misapplying West Virginia's buffer zone rule by approving valley fills which included the placement of overburden in valleys with intermittent or perennial streams. WVDEP moved to dismiss, arguing that state officials applying WVSCMRA and its regulations should be, and could only be, sued in state court.

The district court acknowledged the argument, but disagreed: WVDEP "correctly recognizes the specific duties that the [Petitioners] allege are being violated appear in the WVSCMRA and state regulations. The language and structure of SMCRA demonstrate, however, that these

duties under an approved state program, such as West Virginia's, are incorporated into federal law." (App. at 35a.) Having construed SMCRA and the Complaint to sustain jurisdiction, the district court ultimately disagreed with WVDEP's construction of the buffer zone rule, found that the regulation required the Director to make seven specific findings, and issued a permanent injunction. (App. at 82a-87a.)

It was this statutory interpretation of SMCRA that the Court of Appeals rejected. Specifically, the Court of Appeals explained:

> Congress designed a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority, depending on whether the State elects to regulate itself or to submit to federal regulation. Because West Virginia is a primacy state, its regulation of surface coal mining on nonfederal lands within its borders is "exclusive." See 30 U.S.C. § 1253(a); 30 C.F.R. § 948.10. This federal policy of encouraging "exclusive" State regulation was careful and deliberate. The Act's preliminary findings explain that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." 30 U.S.C. § 1201(f). According to the Act, it is the States, not the federal government, that are to "develop and implement a program to achieve the purposes of this chapter." Id. §

> 1202(g). To make this point absolutely clear, SMCRA provides explicitly that when States regulate, they do so exclusively, see Id. § 1253(a), and when the Secretary regulates, he does so exclusively, see Id. § 1254(a).

(App. at 18a.)

The Court of Appeals then outlined how the ongoing federal interest in enforcing minimum standards across the nation is protected and vindicated through a "limited and ordered federal oversight, grounded in a process that can lead ultimately to the withdrawal of the State's exclusive control. See, 30 U.S.C. §§ 1271, 1267." Until that withdrawal occurs, however, "the minimum national standards are attained by State enforcement of its own law." (App. at 19a.)

Consequently, the Court of Appeals found that "the district court's injunction created two layers of indignity, as it not only directed the Director to make findings required by the West Virginia Act, see W.Va. Code sec. 22-3-18, but in so doing, also ordered the Director to make findings required by the state-law buffer zone regulation, see W.Va. Code St. R. tit. 38 sec. 2-5.2." (App. at 22a) (applying Pennhurst, 465 U.S. 89 (1984)).

The Court of Appeals concluded that Petitioners' "claims filed against the State Director in federal court are not authorized by the Ex Parte Young exception to the Eleventh Amendment." (App. at 25a) (citing 209 U.S. 123 (1908)). The district court's injunction was therefore vacated and the case was ordered remanded for dismissal without prejudice, giving Petitioners the right to present their claims in West Virginia state court. (App. at 3a.)

SUMMARY OF THE ARGUMENT

The Court of Appeals properly concluded, based on a thorough and consistent construction of SMCRA, that West Virginia obtained exclusive jurisdiction over coal mining activities within its borders when it enacted, and OSM approved, the State's surface mining program. Exclusive jurisdiction means that SMCRA no longer directly governs coal mining in West Virginia; WVSCMRA does. The district court therefore lacked jurisdiction over the alleged violations of State regulations in this case, under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

Reaching this conclusion, the Court of Appeals also properly declined to adopt Petitioner's arguments, based principally on cases construing other environmental regulatory statutes involving cooperation between the States and the federal government, that State mining laws are somehow incorporated or codified into federal law. SMCRA alone provides for "exclusive" State regulation, and the other authority relied upon by Petitioners involves different citizen suit provisions and different factual situations which do not raise the Eleventh Amendment concerns presented in this case.

Finally, the Court of Appeals' decision is amply supported, and justified, by the decisions of West Virginia's highest court. It has recognized and faithfully maintained SMCRA's minimum national standards in construing the State's federally-approved mining laws. Cooperative federalism and the Eleventh Amendment remain alive and well together in West Virginia.

Because the statutory construction of SMCRA is simple, uncontradicted, and not inconsistent with cases construing other statutes, this case presents no issues or conflicts which warrant a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW RESTS ON A STRAIGHT FORWARD STATUTORY CONSTRUCTION.

A. The Fourth Circuit Properly Concluded That SMCRA Creates Exclusive State Regulation.

While Petitioner nominally alleged violations of federal SMCRA to invoke federal court jurisdiction, the claims presented by Counts II and III of their Complaint sought relief for specific violations of West Virginia's surface mining regulations. The sole issue was WVDEP's alleged disregard of the State's buffer zone regulation, and whether that disregard violated state or federal law.

Petitioners invoked SMCRA's citizen suit provision. On its face, that statute is limited to enforcement of SMCRA. The section on which appellees rely for federal jurisdiction is entitled, "Civil action to compel compliance with 30 U.S.C. §§ 1201 et seq." 30 U.S.C. § 1270. The specific subsection on which Petitioners rely provides for civil actions to compel compliance with "this Act ... where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act ...." 30 U.S.C. § 1270(a)(2). "This Act" means federal SMCRA, not WVSCMRA.

The Fourth Circuit's opinion, that State law governs this dispute, flows from its construction of SMCRA's plain language. From inception, SMCRA contemplated state-by-state regulation, not one universal federal formula. See 30 U.S.C. § 1202(g). Coal mining is a site-specific activity. The first section of SMCRA contains Congress' finding that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions ... the primary governmental responsibility ... for surface mining and reclamation operations subject to this chapter should rest

with the States." 30 U.S.C. § 1201(f). The stated purposes of SMCRA are, among others, to "assist the States in developing and implementing a program to achieve the purposes of this chapter," 30 U.S.C. § 1202(g), and also to "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter," 30 U.S.C. § 1202 (i).

The federal Office of Surface Mining Regulation and Enforcement was created and its Director commanded to review and approve "State programs for controlling surface coal mining operations." 30 U.S.C. § 1211(c)(1). Further, the Director must "assist the States in the development of State programs ... which meet the requirements of this chapter, and at the same time, reflect local requirements and local environmental and agricultural conditions." 30 U.S.C. § 1211(c)(9).

The intention for exclusive State or Federal regulation is further developed in Subchapter V of SMCRA. 30 U.S.C. §§ 1251-79. The Secretary of the Interior is charged with publishing and promulgating regulations for the approval of State programs and with developing and implementing separate Federal programs. 30 U.S.C. § 1251(b). Interim processes, which governed the transition to State programs or to a Federal program within States without their own programs, are delineated at 30 U.S.C. § 1252.

Making the policy choice even more explicit, SMCRA provides that each state "which wishes to assume exclusive jurisdiction" over surface coal mining within its borders must submit to the Secretary a "State program" which includes a "State law" for regulating, sanctioning and effectively implementing the requirements of SMCRA. 30 U.S.C. § 1253(a). The Secretary is directed to promulgate and implement a "Federal program," only for States that fail to submit, receive, or maintain approval of a State program.

30 U.S.C. § 1254(a). Additionally, 30 U.S.C. § 1254(b) authorizes the Secretary to federally enforce any part of a State program that is not being enforced properly by the state. Notably, in all the years since approval of West Virginia's program, the Secretary has never exercised enforcement power under § 1254(b) because of any improper application of West Virginia's buffer zone rule.

Congress also provided that "[a]ction of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law," without limiting the rights of individuals to bring citizen suits. 30 U.S.C. § 1276(e).

This same dichotomy of separate Federal or State programs echoes in the remainder of SMCRA. See, e.g., 30 U.S.C. §§ 1256(a); 1257(a) (each permit application "pursuant to an approved State program or a Federal program"); 30 U.S.C. § 1258(a) (each reclamation plan "pursuant to any approved State program or a Federal program"). Indeed, a conjunctive "or" separates "State" from "Federal" programs in almost every instance. Even without the "or," SMCRA separates the State and Federal programs. See, 30 U.S.C. § 1265(c) (stating, "Each State program may and each Federal program shall include procedures" by which a permit may be granted "for purposes set forth in paragraph (3) of this Subsection."). The federal regulations similarly refer to discrete State programs. E.g., 30 C.F.R. §§ 730.5; 731.14.

The Fourth Circuit, relying on this language, concluded that SMCRA itself operates as a "blueprint," establishing minimum national standards for State programs. (App. at 9a, 24a.) States seeking exclusive jurisdiction follow the blueprint, adjusting and adapting it to fit their own terrains and environments. Once OSM approved West Virginia's program (with its unique natural drainways and buffer zone), Congress intended for SMCRA to "drop out," and for state law to become "the sole

operative law," as the Fourth Circuit found. (App. at 20a - 21a.)

Other courts have recognized this since SMCRA's initial judicial challenges. For example, in 1981, the Court of Appeals for the District of Columbia Circuit held, "the state regulatory authority decides who will mine in what areas, how long they will conduct mining operations, and under what conditions the operations will take place [and] it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply." In re Permanent Surface Mining Regulations Litigation, 653 F.2d 514 at 519 (D.C. Cir. 1981). That court contrasted the independence of a state administering an approved state program under SMCRA with the continuing role of the EPA after a state has assumed responsibility for pollution discharge permits under the Clean Water Act. Id. at 519 n.7. The Circuit Court's conclusion in this case follows the District of Columbia Circuit's early analysis of SMCRA's state-based design. (App. at 19a.)

B. Because This Case Involves Only State Law, Ex Parte Young Does Not Apply.

The Fourth Circuit recognized that SMCRA's citizen suit provision gives limited access to the federal courts. It allows lawsuits in federal court against the appropriate State regulatory authority only "to the extent permitted by the eleventh amendment to the Constitution." 30 U.S.C. §

1270(a)(2).[3] To bring their claim in federal court, Petitioners had to raise a violation of SMCRA, and their action must not be prohibited by the Eleventh Amendment.

Yet Counts II and III of their Second Amended Complaint specifically invoke the state's buffer zone rule. Count II makes a passing, secondary reference to the federal buffer zone regulation, 30 C.F.R. § 816.57; no federal statute is mentioned. JA at 1794-1796. Count III cites only the state buffer zone rule. JA at 1796-1797. The federal statute relied on in the Petition is 30 U.S.C. § 1260(b). It appears in Petitioners' Complaint only as a parallel citation in Paragraph 56, which first acknowledges that the WVDEP director's duties arise from the "State program":

> According to the approved State program, Defendant Miano has a non-discretionary duty to refrain from approving a permit application unless the application affirmatively demonstrates and Defendant Miano finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, that the

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[3] SMCRA's citizen suit provision is also limited to alleged failures of the State official "to perform any act of duty under this chapter which is not discretionary." 30 U.S.C. § 1270(a)(2). West Virginia argued before the Circuit Court that the WVDEP's permitting decisions about where and how to apply West Virginia's buffer zone rule are discretionary acts, citing Monongahela Power v. Reilly, 980 F.2d 272, 277 n.5 (4th Cir. 1992) and Kennecott Copper v. Costle, 572 F.2d 1349 (9th Cir. 1978). The Fourth Circuit did not reach this alternative reason for finding that the district court exceeded its jurisdiction. This issue remains a significant obstacle for Petitioners, even if certiorari is granted.

> application is complete and accurate and the applicant has complied with all requirements of the West Virginia Surface Coal Mining and Reclamation Act and its implementing regulations. 38 C.F.R. § 2-3.32.d; 30 U.S.C. § 1260(b).

JA at 1793-1794.

To establish federal jurisdiction, Petitioners attempt to create an issue of federal law by arguing that the Director's alleged duty to issue permits in compliance with the law derives directly from 30 U.S.C. § 1260(b). Petition at 14-17. The argument has no merit. Because West Virginia's State program has its own provision, requiring the Director to follow the State program, the Fourth Circuit's construction of SMCRA leads to the ineluctable conclusion, in this case, that Petitioners' remaining claims arise under state, not federal law.

Counts II and III, as discussed above, arise wholly out of the State's buffer zone rule. The Director's obvious duty to apply the State program derives from the State's laws, following the federal "blueprint." The State program's statute parallel to 30 U.S.C. § 1260(b) prohibits permit approval unless "all the requirements of this article and rules thereunder have been complied with." W.Va. Code § 22-3-18(b)(1). Indeed, in paragraph 56 of their Complaint, Petitioners invoke the similar West Virginia regulation before the reference to 30 U.S.C. § 1260(b). That regulation prohibits permit approval unless the application demonstrates and the Director finds, in writing, that: "The application is complete and accurate and the applicant has complied with all requirements of the Act and this rule." 38 W.Va. Code St. R. § 3.32.d.1.

Distilled to its essence, Petitioners' theory is that all these state and federal statutes and regulations simultaneously control the Director of WVDEP, giving

access to both State and federal courts for challenges to a State regulator's conduct. The Fourth Circuit rejected this argument. The buffer zone rule is a State regulation, part of a series of regulations specifically crafted to West Virginia's circumstances. State law requires the Director to refrain from issuing permits unless the State program has been complied with. For exclusive jurisdiction to have any meaning, the State law alone must govern the Director's permitting decisions. Petitioners' theory that Counts II and III allege violations of non-discretionary duties directly under SMCRA is no more than an attempt to turn a duty which arises solely out of a West Virginia regulation, promulgated under a West Virginia statute, into a federal statutory violation. This argument would render meaningless SMCRA's careful crafting of exclusive systems of Federal and State regulation. If every alleged failure of a State official to deny a permit for failure to follow a State regulation also amounts to a violation of 30 U.S.C. § 1260(b), then all such claims would give rise to federal jurisdiction, a conclusion wholly inconsistent with SMCRA's intent and its limited federal court jurisdiction. See 30 U.S.C. § 1270(a)(2).

Assessing the Petitioners' claims and SMCRA's grant of exclusive state jurisdiction in light of the Eleventh Amendment, the Fourth Circuit carefully considered the "intrusion on State sovereignty" presented in this case. (App. at 22a) (citing Pennhurst, 465 U.S. at 106). Viewed in that light, the district court's injunction commanded the State official to follow "the State's own law, not federal law, because only the State law is operative and directly regulates the issuance of permits." (App. at 22a.) Because the buffer zone rule is a State regulation, and because the Director's duties to issue permits in accordance with the law arise under a State statute which follows SMCRA's "blueprint," the Fourth Circuit concluded that Pennhurst plainly applies. Ex parte Young's concern for harmonizing Eleventh Amendment rights with the need to uphold the "supreme authority of the United States" simply does not

apply to this case, because the "supreme authority" is not at risk in an action arising out of State laws and regulations. 209 U.S. at 159. The fact that the State's program mirrors SMCRA does not, and cannot, mean that federal law applies.

Moreover, the Fourth Circuit found that refusing to assert jurisdiction over the Director was consistent with this Court's recent Eleventh Amendment jurisprudence and comported with general concerns of state sovereignty and federalism. See, Bragg, 248 F.3d at 296-97 (citing Alden v. Maine, 527 U.S. 706 (1999), Coeur d'Alene Tribe, 521 U.S. 561 (1997), Seminole Tribe v. Florida, 517 U.S. 44 (1996)). Expressing those views itself, this court recently held, "each State is a sovereign entity in our federal system[,] and ... 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" Seminole Tribe, 521 U.S. at 54 (quoting The Federalist No. 81 (A. Hamilton)). The following analysis more fully sets forth these principles, and their application to the instant case.

C. The Fourth Circuit's Opinion Does Not Conflict With Other Decisions Of This Court or Other Federal Courts.

In addition to their argument that 30 U.S.C. § 1260(b) directly governs the Director's actions, Petitioners argue that West Virginia's mining laws are somehow incorporated into SMCRA, creating federal jurisdiction under 30 U.S.C. § 1270(a)(2). Because nothing in SMCRA specifically incorporates, adopts, or converts state law into federal law, Petitioners rely largely on federal cases discussing other federal environmental statutes creating joint

federal/state programs.[4] But those regulatory programs are all different from SMCRA, and the cases pose no conflicts with the Fourth Circuit's construction of SMCRA.

1. The Fourth Circuit's Opinion is Consistent with This Court's Decisions.

The Circuit Court's opinion is faithful to the Eleventh Amendment cases cited above. In addition, the Fourth Circuit's refusal to convert state law into federal law is consistent with United States Department of Energy v. Ohio, which Petitioners do not cite. 503 U.S. 607 (1992). Ohio argued that its state-law fines "arise under Federal law," given the "complementary relationship" between federal and state water laws. Id. at 625-26. This Court rejected that argument, noting concerns about statutory drafting and the tensions arising out of the United States' sovereign immunity which required the use of a "narrow construction" in that case. Id. at 627. The Fourth Circuit's ruling in this case notes similar concerns and reconciles the same tensions.

Petitioners' argument to the contrary, no conflict exists between the Fourth Circuit's opinion and this Court's decision in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997). WVSCMRA gives affected individuals the right

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[4] Petitioners also cite cases decided under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., but in light of that Act's language, those cases seem inapplicable. The IDEA does not offer "exclusive jurisdiction" to the states, as does SMCRA. To the contrary, the Act requires states to provide a host of administrative remedies, and if those remedies fail, to submit to federal district court jurisdiction. 20 U.S.C. § 1415(a)-(i). Moreover, the Act expressly abrogates sovereign immunity for participating states. 20 U.S.C. § 1403(a); Little Rock Sch. Dist. v. Mauney, 183 F.3d. 816, 832 (8th Cir. 1999).

to sue the Secretary of WVDEP, in state courts, to enforce those state rights. W.Va. Code § 22-3-25. The Fourth Circuit observed that because "West Virginia courts are open to such suits, the federal interest in maintaining the State'sasdf compliance with its own program may be fulfilled via suit in that forum, in a manner that does not offend the dignity of the State." (App. at 24a) (citing Coeur d'Alene Tribe).

Petitioners imply that the Fourth Circuit based its decision, in part, on a minority view from Coeur d'Alene Tribe. But the Fourth Circuit's opinion is different. It discusses the availability of a state forum to enforce state laws. A minority in Coeur d'Alene Tribe discusses the availability of a state forum to enforce federal rights as one factor in determining the extent of the Ex parte Young doctrine. 521 U.S. at 274 (Kennedy, J. concurring). The Fourth Circuit's discussion of the availability of a state forum occurs in the context of its thoughtful assessment of the extent to which the state's "dignity interest" is implicated in the Eleventh Amendment analysis. (App. at 23a - 25a.)

While Petitioners argue that the Fourth Circuit followed the minority in Coeur d'Alene Tribe, the Circuit Court's SMCRA-based analysis is, in fact, consistent with the Coeur d'Alene Tribe majority's view that "immunity is designed to protect" the "dignity and respect afforded a State" 521 U.S. at 268. Further, the Fourth Circuit's analysis follows this Court's admonition that an "[a]pplication of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." Id. at 270. As discussed in Section II, below, the Fourth Circuit's respect for the role of West Virginia's judicial system in enforcing WVSCMRA is well-justified, for specific substantive reasons as well as for the structural and institutional reasons inherent in all Eleventh Amendment inquiries.

Nor does the Fourth Circuit's opinion conflict with decisions of this Court interpreting other federal environmental statutes or regulatory schemes that require cooperation between State and federal authorities. SMCRA is unique in its deference to the states, as the Fourth Circuit found. (App. 17a - 18.) Petitioners rely heavily on Arkansas v. Oklahoma, which arose under the Clean Water Act (CWA). 503 U.S. 91 (1992). But the federal role in CWA programs and permits is integral to the process, unlike the limited oversight role OSM plays in State surface mining programs. See In re Permanent Surface Mining Regulations Litig., 653 F.2d at 519.

For example, permits issued under the CWA are required, by law, to be transmitted to EPA, and EPA's Administrator has the authority to object and stop the issuance of a permit, unless the Administrator has waived objections.[5] See 33 U.S.C. § 1342(d). No such interlocking, permit-by-permit authority exists under SMCRA. So the Fourth Circuit's comparison of the mutually exclusive State or Federal regulation created by SMCRA to the more federal character of the CWA is supported by the plain language of both statutes.

Moreover, Arkansas v. Oklahoma did not hold that the state water laws, applied interstate, are automatically incorporated into federal law, as Petitioners contend. Arkansas v. Oklahoma held that CWA regulations "effectively incorporate" state law, and acknowledges the "federal character" of state pollution standards under the CWA. 503 U.S. at 110. But Arkansas v. Oklahoma involved a federal permit for a Fayetteville, Arkansas water treatment

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[5] Although the Administrator may waive the notice requirements under 33 U.S.C. § 1342(d), another subsection, 33 U.S.C. § 1342(b)(5) still requires notification of the EPA when the discharging state fails to adopt a recommendation from a neighbor state that will be affected by the discharge. See, 33 U.S.C. § 1342(e).

plant that discharged into a stream flowing into Oklahoma. The question in Arkansas v. Oklahoma was which State's regulations - Arkansas' or Oklahoma's - EPA had the authority to apply. 503 U.S. at 104-05. The interstate flow of water in Arkansas v. Oklahoma federalized the issue, giving EPA the discretionary authority - but not necessarily the obligation - to apply a downstream state's water quality standards in its federal permit. This holding stands in stark contrast to the localized nature of surface coal mining and the state, not federal, permit in this case.

Petitioners also cite EPA v. California for the proposition that discharge permits issued pursuant to State permit programs under the CWA are federally enforceable, without noting the critical fact that permits for federal facilities were the underlying issue in that case. (Petition at 26) (citing 426 U.S. 200, 224-25 (1976)). The question in that case was not whether state water regulations became federal law, but rather was "whether federal installations discharging water pollutants in a state with a federally approved permit program are to secure their permits from the state, or from the [EPA]." 426 U.S. at 201-02. Under the CWA, Federal installations are required to "comply with Federal, State, intrastate, and local [pollution] requirements." 33 U.S.C. § 1323(a). This Court held that federal facilities need federal permits, and are not required to obtain state NPDES permits under the Federal Water Pollution Control Act Amendment of 1972.[6] EPA v.

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[6] Interestingly, SMCRA reaches a parallel substantive conclusion, creating a Federal program for surface mining on federal lands, directing OSM to include at a minimum the requirements of the approved State program, and allowing cooperative agreements for State regulation if the Secretary of the Interior so desires. 30 U.S.C. § 1273. This section of SMCRA further underscores the mutually exclusive nature of SMCRA's regulatory construct, even on federal lands.

California, 426 U.S. at 211, 227 (applying Hancock v. Train, 426 U.S. 167 (1976) (issued on the same day as EPA v. California)). Because the CWA specifically applies state standards to federal facilities, the holding in EPA v. California does not support Petitioners' argument that state mining regulations are somehow generally incorporated into SMCRA and applied to non-federal lands.

2. The Fourth Circuit's Opinion is Consistent with Decisions of Other Circuit Courts of Appeals.

Similarly, the Petitioners' recitation of Circuit Courts of Appeals cases applying the CWA, the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA) are inapposite. (Petition at 26-28.) None of these statutes offer "exclusive jurisdiction" to the states, as does SMCRA, and none of them arose under citizens' suits provisions drawn as narrowly as 30 U.S.C. § 1270(a)(2). Nor do any of them address the same Eleventh Amendment issue resolved by the Fourth Circuit in this case.

- **CWA Cases**

Plaintiffs invoke one other CWA case, NRDC v. California Department of Transportation, but that case alleged that a State agency violated its permit. 96 F.3d 420 (9th Cir. 1996). The permit "required [the California Department of Transportation] to control polluted stormwater runoff from roadways and maintenance yards in Southern California." Id. at 421. The Ninth Circuit held that the CWA and this Court's prior holdings specifically abrogated Eleventh Amendment protection for suits against state agencies as permit holders. Id. at 422 (citing Pennhurst and Ex Parte Young). NRDC v. California differs from the instant case, because the Director of WVDEP has been sued as a regulator not as a permit holder. See, Pennhurst 465 U.S. at 106 (holding "it is difficult to think of a greater

intrusion on State sovereignty than when a federal court instructs State officials on how to conform their conduct to State Law.") (The Fourth Circuit also cited this holding, 248 F.3d at 296.) Nor does the SMCRA citizen suit provision at issue, 30 U.S.C. § 1270(a)(2), contain the same language which the Ninth Circuit found sufficient to create jurisdiction over California as a permit holder. Id. at 424 (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)).[7]

- **RCRA Cases**

Petitioners also distort the import of the principal RCRA case they cite. The question in Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997), was whether RCRA "authorizes citizen suits in federal courts claiming only violations of state standards that exceed the federal criteria." 130 F.3d at 410. The Ninth Circuit found that RCRA did not authorize citizen suits based on state standards that exceed the federal criteria. Id. at 412. The Ninth Circuit's analysis turned on the language of RCRA's citizen suit provision. This provision is broad, and it permits any person to sue any other person (including government agencies to the extent permitted by the Eleventh Amendment) "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to this chapter." Id. (citing 42 U.S.C. § 6972(a)(1)(A)).

This "pursuant to" language is broader than SMCRA's separate citizen suit provision for regulatory authorities, which is limited to alleged failures "to perform any act or duty under this chapter which is not discretionary." 30 U.S.C. § 1270(a)(2). Thus, while the federal district courts listed in the Petition's footnote 9 have differed over whether state programs have "become

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[7] It is, however, similar to 30 U.S.C. § 1270(a)(1).

effective pursuant to" RCRA, that argument is not available to Petitioners in this case.

Even if WVSCMRA could somehow be conceived as enacted "pursuant to" SMCRA, it is not SMCRA itself. Nothing in SMCRA explicitly adopts, incorporates, or transmogrifies state regulations into federal law. Moreover, the Ashoff court, near the end of its opinion, discusses the desirability of a narrow reading of RCRA on policy grounds, to avoid "inappropriate interference with state authority." 130 F.3d at 413. Similar policy concerns support the Fourth Circuit's construction of SMCRA, WVSCMRA, and the citizen suit provisions of both.

- **Clean Air Act Cases**

Air, like water, moves freely across state lines, and the Clean Air Act, like the CWA, therefore recognizes a more prominent role for the federal government than does SMCRA with its focus on land and coal reserves. For example, the Clear Air Act's citizen suit provision differs from SMCRA's. It permits citizen suits against the EPA Administrator, but not state officials, for violations of non-discretionary duties. 42 U.S.C. § 7604(a)(2). Violations of SIPs (State Implementation Plans) are made specifically enforceable by the plain language of the CAA's citizen suit provision, which permits suits for violations of emission standards or limitations. 42 U.S.C. § 7604(a)(1). The CAA defines "emission standard or limitation" to include schedules or timetables for compliance and "any other standard, limitation or schedule ... under any applicable state implementation plan." 42 U.S.C. § 7604(f). All this differs dramatically from SMCRA and its limited citizen suit provision against state regulators.

Other differences separate the CAA from the opinion below. The first CAA case Petitioners cite, Espinosa v. Roswell Tower, Inc., 32 F.3d 491 (10th Cir. 1994), does not even arise under the CAA's citizen suit provision, but rather

involves a suit by New Mexico's State regulator under 42 U.S.C. 7412. The other cases involve plain statutory constructions of 42 U.S.C. § 7604 and its specific inclusion of SIP enforcement in its citizen suit provision.

Not one of the CAA cases cited by Petitioners even discusses the Eleventh Amendment, Ex Parte Young or a state's dignity interest. Indeed, although New Jersey and New York were named defendants in two of the cases, neither participated in the appeals cited by plaintiffs. None of the New York defendants appeared in the district court or the Circuit Court in Friends of the Earth v. Carey, 535 F.2d 165, 168 n.1 (2d Cir. 1976). Likewise, in American Lung Association v. Kean, the Second Circuit never addressed the issue of whether the Eleventh Amendment barred this citizen suit under the CAA against New Jersey. 871 F.2d 319 (3d Cir. 1989). Indeed, New Jersey did not join in the appeal, contest the district court's order, nor did it assert sovereign immunity before the district court. Kean, 871 F.2d at 321; 670 F.Supp. 1285, 1889-90 (D.N.J. 1987). The appeal was taken instead by intervenor trade associations who wanted more time to comply with the district court's order. 871 F.2d at 322-23. New Jersey was apparently "satisfied that it was given enough time to come up with a reasonable proposal." Id. at 328.

In short, none of the CAA cases Petitioners cite are applicable, because SIPs are specifically made enforceable by the CAA's citizen suit provision and because none of them involved an active state defendant or discuss the Eleventh Amendment issues presented in this case. Thus, the only Constitutional obstacle to asserting jurisdiction that these Courts faced is Article III's "arising under" language, a much lower barrier than the Eleventh Amendment question this Court faces. The cases Petitioners cite actually illustrate the wisdom of the Fourth Circuit's careful scrutiny and construction of SMCRA, as well as the contrasts drawn by the Fourth Circuit with the Clean Water Act, RCRA and Clean Air Act. Each of those statutes voluntarily applies or

references state standards in specific situations; none of them do so in the wholesale manner argued by Petitioners. Because of these different statutory schemes, none of the cases Petitioners cite illustrate any differences among the various Circuit Courts that would warrant a grant of certiorari.

- **SMCRA Cases**

No other Circuit Courts of Appeal have addressed the same SMCRA issues presented by this case. The United States Court of Appeals for the Third Circuit, however, has pending before it Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Seif, No. 01-1683. That case raises the exact questions that were raised in Bragg. Unless and until the Third Circuit or some highest state court disagrees with the Fourth Circuit's analysis, there is no reason to believe it might be wrong. Indeed, the decision below was unanimous and despite a petition for rehearing *en banc* raising the exact same claims raised in the instant petition for certiorari, not a single judge in the entire Fourth Circuit voted to rehear the case.

As Petitioners note, the Fourth and Third Circuits have addressed the different jurisdictional language in 30 U.S.C. § 1270(a)(1) and (f), but those sections are not at issue in this case. The Fourth Circuit's decision in Molinary v. Powell Mountain Coal Co., Inc., 125 F.3d 231 (4th Cir. 1997) did not address whether state surface mining programs are federal law within the purview of Ex Parte Young. Molinary was a citizen suit against a coal operator, brought under 30 U.S.C. § 1270(f). That section creates an action for damages against "any operator," not any regulatory authority, for violations of "any rule, regulation, order or permit issued pursuant to this chapter," but not for violations of SMCRA itself. Molinary did not even discuss the Eleventh Amendment. The Third Circuit also construed 30 U.S.C. § 1270(a)(1) and (f) in Haydo v. Amerikohl Mining,

Inc., and concluded that SMCRA's grant of "exclusive jurisdiction" precluded federal jurisdiction over suits against coal operators for alleged violations of State programs. 830 F.2d 494, 498 (3d Cir. 1987). Haydo, like Molinary, did not involve a claim against a state regulator, did not involve the narrower jurisdictional language of 30 U.S.C. § 1270(a)(2) and did not reach the Ex Parte Young issue. Accordingly, neither of these cases creates a conflict which justifies certiorari.

II. No Compelling Need for This Court to Review The Work of the Court of Appeals Exists Because It Has Not Been Criticized by the Highest State Court.

This Court need not review the work of the Court of Appeals because it has not been criticized by the highest state court. Petitioners argue that there is some inconsistency between the Fourth Circuit's holding in Bragg and a series of West Virginia Supreme Court cases. Canestraro v. Faerber, 374 S.E.2d 319 (W.Va. 1988); DK Excavating, Inc. v. Miano, 549 S.E.2d 280 (W.Va. 2001); and Antco, Inc. v. Dodge Fuel Corp., 550 S.E.2d 622 (W.Va. 2001) (collectively, "the Canestraro line"). That assertion is wrong.

The essential holding in Bragg is that West Virginia's mining statutes and regulations are state law, not federal law. The Canestraro line deals with a different question: How is state mining law to be applied or construed when the states' laws or regulations are less stringent than the minimum federal standards?

Unlike many states and many reported opinions, the law of West Virginia is expressed in syllabus points which the State's Constitution requires the state's Supreme Court of Appeals to write, as well as in the opinions themselves. W.Va. Const. art. VIII, § 4. The syllabus points and the opinions must be read together. See State v. Franklin, 139 W.Va. 43, 57 (1953) (citing Koblegard v. Hale, 60 W.Va. 37 (1906)) (holding that "the syllabus of the case must, of

course, be read in light of the opinion."[8]) The first syllabus point in Canestraro states the holding as follows:

> "When a provision of the West Virginia Surface Coal Mining and Reclamation Act is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, the state act must be read in a way consistent with the federal act.

374 S.E.2d 319, Syllabus pt. 1 (citations omitted).

The Canestraro case involved a notice and public access provision in WVSCMRA that was approved by OSM, but found by the West Virginia Supreme Court of Appeals to be less stringent than the applicable federal standards. Id. at 321. DK Excavating was an appeal from a state administrative action, in which an excavating company relied on a state mining statute enacted by the state's legislature but not approved by OSM because it was less stringent than SMCRA. 549 S.E.2d at 283. WVDEP, mindful of its obligations under the approved program, argued that it could not apply the enacted, but disapproved statute. Id. Antco held that a violation of a state permit constitutes prima facia negligence, and follows Canestraro. 550 S.E.2d 622, Syllabus Pt. 11.

The Canestraro line simply establishes that West Virginia law will be construed consistently with federal minimum standards when the State's program is less stringent. These cases have no significance for the instant case, which does not involve a state statute or regulation

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[8] Another case from the same year, Citizens National Bank v. Burdette, 61 W.Va. 635 (1907), interpreted the West Virginia Constitution to make the syllabus "the real decision over the opinion." 61 W.Va. at 636. The better, modern practice requires considering both opinions and syllabi.

that is less stringent than its federal counterparts. As the district court explained, the state buffer zone rule is "similar [to the federal buffer zone rule, 30 C.F.R. § 816.59] but requires additional specific findings to be made by the Director before buffer zone incursion may be authorized." (App. at 59a.)

Because it requires more specific findings, the state regulation at issue in the instant case was, if anything, more stringent than its federal counterpart. Since the District Court's opinion, the buffer zone regulation has been amended to copy the federal regulation, and no longer contains the seven specific findings the District Court commanded the Director to make. 38 W.Va. Code St. R. § 2-5.2.1. For these reasons, the Canestraro line does not apply.

More importantly, however, the Canestraro line justifies Congress' confidence in the states as expressed in SMCRA. It also justifies the Fourth Circuit's holding and respect for the Eleventh Amendment's protection of West Virginia's dignity interest. Each case originated in West Virginia's state courts or state administrative processes. Each case ultimately asked the state's highest court to construe state law and reconcile it with federal minimum standards. In each case, that construction incorporated and adopted federal minimum standards into state law when the state law was found to be less stringent. In DK Excavating, the state regulatory authority reached the same conclusion.

Considering all the syllabus points and opinions, a fair reading of the Canestraro line is that West Virginia's court was construing and applying state law, in recognition of SMCRA's plan for cooperative federalism. Indeed, the DK Excavating opinion, handed down during the pendency of this matter, makes it clear that West Virginia's highest court understood it was construing and applying state, not federal law. "As DEP observes, this Court has on multiple occasions recognized that our state mining laws have to be

interpreted consistent with federal law." DK Excavating, 549 S.E.2d at 285. Further, the court observed:

> It is noted that because the Legislature has elected to provide for, and the Executive has opted to apply for and has obtained approval of this state plan, subsequent amendments to the plan are rendered ineffective unless and until approved by OSM. It is for the Legislature and the Executive, not this Court, to determine when, and if, it is preferable to revert to federal regulation of this state's surface coal activities.

Id. at 285 n.11.

Regardless of whether the Canestraro line construes state law to incorporate minimum federal standards or directly applies federal law, nothing in Bragg involved less stringent state laws. Thus, nothing in Bragg supports Petitioner's extrapolation that Bragg demands that the state court follow "exclusively state law, regardless of whether federal law is more stringent." (Petition at 30.)

The conclusion which should be drawn from the Canestraro line is that West Virginia's executive, legislative, and judicial branches understand their exclusive jurisdiction and understand their responsibility to maintain minimum national standards within the state's boundaries. These cases thus create no confusion about the "validity and content of West Virginia's state mining program," as Petitioners argue. (Petition at 30.) The state's program applies as written. Questions about it belong in state forums.

Persons who specifically believe WVSCMRA to be less stringent than SMCRA, or who generally take issue with its application by WVDEP, have more than adequate redress in state administrative and judicial processes. If, as

a last resort, they believe federal regulation should displace all or part of the State programs, a detailed, federal remedial scheme allows OSM to act. See 30 U.S.C. §§ 1267, 1271. Indeed, SMCRA allows concerned citizens to sue OSM in federal court, as the West Virginia Highlands Conservancy, a Petitioner herein, has recently done, when concerns exist about OSM's oversight. W.Va. Highlands Conservancy v. Norton, 147 F.Supp. 2d 474 (S.D.W.Va. 2001).[9] Access to the state's legislative and executive branches is also available, of course, to any concerned citizen. These avenues for redress strike the balance of cooperative federalism intended by SMCRA - respecting State sovereignty and exclusive State jurisdiction while vindicating the federal interest in enforcing minimum national standards.

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[9] Norton, from the same district court which handled this underlying dispute, also involved claims against WVDEP which were dismissed in light of the Fourth Circuit's opinion in this case. Id.

CONCLUSION

Because the Fourth Circuit opinion relies on a simple statutory construction, and is not inconsistent with opinions of this court, other federal courts or the West Virginia Supreme Court of Appeals, certiorari should not be granted.

Respectfully submitted,

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